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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 223

SAMUEL JOSEPH RUGENDORF, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (R. 69–74) is reported at 316 F. 2d 589.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 1963 (R. 74). A petition for rehearing was denied on May 24, 1963 (R. 76). The petition for a writ of certiorari was filed on June 21, 1963, and was granted on October 14, 1963 (R. 76; 375 U.S. 812). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a search warrant is valid, although the underlying affidavit is based wholly on observations reported by others, where the affidavit shows on its face that there are substantial grounds for crediting the information.

2. Whether one who challenges the validity of a search warrant is entitled to disclosure of the names of confidential informants referred to in the government's affidavit supporting the warrant in the absence of evidence that the affidavit contains misrepresentations.

3. Whether defense counsel adequately asserted at the trial the claim that divulgence of the identity of one of the informants was needed by the accused in connection with his defense on the merits.

4. Whether the evidence supports the verdict.

CONSTITUTIONAL PROVISION, STATUTE, AND RULE INVOLVED

The Fourth Amendment and the pertinent provisions of 18 U.S.C. 2315 and Rule 41 of the Federal Rules of Criminal Procedure appear in the Appendix, *infra*, pp. 63–64.

STATEMENT

Following a trial by jury in the United States District Court for the Northern District of Illinois, petitioner was convicted on an indictment charging him with a violation of 18 U.S.C. 2315 (Appendix, *infra*, p. 63) in that on or about March 22, 1962, with knowledge that they were the fruits of theft, he received, concealed, and stored 81 stolen fur pieces, of a value in excess of $5,000, which had theretofore been trans-

ported in interstate commerce (R. 1, 67). Pursuant to the provisions of 18 U.S.C. 4208(a)(1), the court sentenced him to ten years' imprisonment, specifying that he should become eligible for parole after serving a minimum term of two years (R. 12). The Court of Appeals for the Seventh Circuit unanimously affirmed (R. 69–74).

The principal errors urged relate to (1) the trial court's refusal to suppress as evidence the fur garments which were seized from petitioner's home under the authority of a search warrant; (2) the refusal to require the government to disclose the names of certain confidential informants referred to in the affidavit supporting the search warrant; and (3) the sufficiency of the evidence to support the verdict of the jury. For convenience, we summarize first the evidence of guilt, and thereafter the facts pertinent to the other two issues.

1. The evidence of guilt

(*a*) The evidence adduced by the government in its case in chief was as follows:

Shortly after 5 p.m. on March 22, 1962, agents of the Federal Bureau of Investigation discovered 81 fur pieces in a basement closet in the single-family residence occupied by petitioner and his wife in Chicago (R. 15–16, 25–26). The discovery was made in the course of a search pursuant to a search warrant (R. 4–8, 15). It was stipulated at the commencement of the trial that all 81 of the furs had been stolen (22 from a fur store in Shreveport, Louisiana, in December 1961, and the remainder from a

store in Mountain Brook, Alabama, in February 1962) and that the value of the furs was in excess of $5,000 (R. 15).

Agent Marlin Moore, one of the officers who participated in the search and made the discovery, testified that the basement in which the furs were found was partitioned into two sections by a wall which ran east and west through the center of the building. The rear, or south, segment of the basement was in turn divided into two compartments, one of which was a laundry and furnace room, the other a general storage room. The north half of the basement consisted of a finished recreation room. Adjacent to its east wall was a business-type desk with a telephone. In the center of the room were a card table and a sewing machine. Two or three laundry bags filled with unwashed laundry were hanging on the east wall. Built into the north wall were three closets. The furs were found hanging on individual wire hangers from a rod which extended the length of one of these closets, all of which were closed but unlocked at the time of the agents' arrival. In the same closet was another fur piece, which petitioner's wife (who had admitted the agents to the house and was with them during the search) identified to the officers as her property. Petitioner was not at home at the time of the search (R. 15–16, 25).

Mr. Moore further testified that at the time of the discovery of the furs three large white empty bags were lying in a pile on the floor in the northwest corner of the recreation room. The agents used these bags as containers for the removal of most of

the stolen furs from the premises.[1] The remaining furs were removed in one of the laundry bags hanging on the east wall of the room when the officers arrived. Mrs. Rugendorf had authorized the use of the bag for this purpose and had removed the soiled laundry from it (R. 16).

(*b*) Following agent Moore's testimony and the receipt of the furs in evidence (R. 17, 25), the government rested its case in chief (R. 25). A motion for judgment of acquittal was thereupon made, argued, and overruled (R. 25; Tr. 133–148).[2] The defense then presented its affirmative case (R. 25–54, 59), which may be summarized as follows:

Both petitioner and his wife testified that they had no knowledge of how the stolen furs got into their basement, or even that the furs were there (R. 32, 36, 40). Both testified that they had been on a vacation in Florida from February 17 until March 4, 1962, and that from the latter date until the discovery of the furs on March 22 they had had no occasion to look into the closet in which the furs were found (R. 30–32, 40). Mrs. Rugendorf testified that, shortly before their vacation, she had taken some summer clothing from that closet and had observed no furs there (R. 31, 34); and that after her return

[1] Moore subsequently testified, in the course of his rebuttal testimony (see *infra*, pp. 9–10), that Mrs. Rugendorf gave the officers permission to use the bags for this purpose and that she stated to the agents at the time that the bags were not hers and that she had never seen them before (R. 62).

[2] "Tr." refers to the reporter's transcript, a certified copy of which is on file with the Clerk of this Court.

she had removed articles from another of the closets in the basement (R. 31–32). Petitioner, for his part, testified that he had not been in the basement at all between his return from vacation and the discovery of the furs (R. 40). Both husband and wife stated that they had frequently been away from home during this period. Petitioner said he was at home only at night except on Sundays (when he was at home after about 3 p.m.) (R. 40) and Mrs. Rugendorf that she was away three or four hours nearly every day (R. 32). During Mrs. Rugendorf's absences, she testified, the house was empty except for a dog (*ibid.*)

Both petitioner and his wife further testified that four persons other than themselves had keys to their home during their vacation—their son, a neighbor, petitioner's brother Leo, and petitioner's sister (R. 30, 39; Tr. 200–201, 259). Leo Rugendorf was a known "fence", or receiver of stolen property.[3] The theory of the defense, as articulated by counsel in his summation (Tr. 535–541, 543–547, 554), was that Leo had placed the stolen furs in the basement without petitioner's knowledge. Petitioner testified that on February 17, the day he left on vacation, Leo came to his place of business and offered to look after the house and take in the mail during his absence; that petitioner, after initially refusing, accepted Leo's proposal and gave him the key to the house; and that Leo had never returned the key (R. 39; Tr. 261–264).

Mrs. Rose Lams, who lived next door to petitioner, testified that on February 18, the day after the

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[3] Chicago police officer James Kelleher testified that Leo was known to him as a receiver of stolen goods (R. 30).

Rugendorfs' departure for Florida, a man who introduced himself as petitioner's brother Leo came to her house and told her that petitioner had given him the key to his residence and that if she saw lights on at night she should not call the police (R. 28). The witness never say her caller again (*ibid.*).

(*c*) In rebuttal of petitioner's assertion that his brother Leo had never returned the key, F.B.I. agent Richard Lee, one of the arresting officers, testified that petitioner told him, on the evening of his arrest, that Leo—two and a half weeks previously, and not long after petitioner's return from vacation—*had* brought the key back (R. 63, 64). (Petitioner, in addition to testifying that Leo never returned the key, denied on cross-examination that he had ever told the arresting officers that the key had been returned (R. 45).)

In further impeachment of petitioner's credibility and that of his wife, the government presented additional rebuttal testimony sharply contradicting, in numerous details, their versions of the relevant events. Among the instances of conflict were the following:

(i) Petitioner testified that while he was being driven by the arresting officers to the local headquarters of the F.B.I., the officers asked him where they could find his brother Leo, where Leo's meat market was located, and how many furs Mrs. Rugendorf owned; that he replied she had four and stated how old the furs were; that the officers then inquired what he was going to do with the "rest of" the furs; and that they kept "pounding" him with questions

about furs throughout the drive (R. 40; Tr. 270–271, 303). Agent Lee, one of the arresting officers, denied that any such exchanges had taken place (R. 63; Tr. 394–395).

(ii) Petitioner testified that at the F.B.I. offices, after a period of interrogation lasting an hour or an hour and one-half, he began screaming to the agents that he was a diabetic, had had nothing to eat all day, and "needed Orinase" (R. 41; Tr. 274). Agent Lee, on the other hand, testified that immediately following their arrival at F.B.I. headquarters they took petitioner to the fingerprinting room; that during the course of the fingerprinting they asked him various "background questions" for "descriptive purposes," such as whether he had had any military service; that he replied in the negative and disclosed his diabetic condition; that, as soon as he told the officers this, they asked him if he desired medication or food; that he declined both, explaining that while his medication consisted of four Orinase tablets daily (two to be taken with his breakfast and two with his supper), he had no particular eating schedule and was not on a rigid diet; that on four subsequent occasions during petitioner's detention in the F.B.I. offices, at thirty-minute intervals, the agents offered him food and Orinase, which in each instance he declined; that, later in the evening, while the agents were driving petitioner from the F.B.I. headquarters to the Chicago Police Department, they stopped at a drug store and obtained four Orinase tablets; and that at no time, from the moment of his arrest until his delivery at

the police station, did petitioner ever scream that he needed food or Orinase (R. 63; Tr. 395–397).

(iii) Petitioner testified that the officers told him at F.B.I. headquarters that they knew his brother Leo had put the stolen furs in petitioner's basement, and that if he (petitioner) would so state he could go home immediately; that petitioner, asked by the agents where Leo was, replied that he did not know; that, at the instigation of the officers, who dialed the numbers for him, he called Leo's home and the home of his sister Rose in unsuccessful efforts to locate Leo for the officers; that the officers asked him to swear on his mother's grave that he knew nothing about the furs; and that he replied that he would not only so swear on his mother's grave but would take a similar oath on his father's grave and would be willing to take a lie-detector test to prove his innocence (R. 42–44; Tr. 278, 280–284). Each of these allegations was denied by Agent Lee (R. 64–65; Tr. 398, 401). The agent testified that it was petitioner who suggested to the officers the likelihood that his brother Leo had put the furs in petitioner's basement; that petitioner was desirous of getting in touch with his brother; and and that the officers permitted him to use the telephone for this purpose (R. 64; Tr. 398–401).

(iv) Mrs. Rugendorf testified that on the occasion of the discovery of the stolen furs by the F.B.I. agents, one of the agents stated to her that the officers knew that her brother-in-law Leo had been a source of embarrassment and humiliation to her and her family (R. 32–33, 36). Agent Moore denied that any

such statement was made (R. 61). He testified that it was Mrs. Rugendorf who injected Leo Rugendorf's name into the conversation, saying that "This looks like another instance where Leo has gotten Sam [petitioner] in trouble and caused us embarrassment" (R. 62).

(v) Mrs. Rugendorf was asked on cross-examination whether she did not say to the officers, after reading the search warrant which they served on her, that she and her husband had been on vacation, that if there was anything in their basement that was stolen they knew nothing about it, and that it must have been put there in their absence by Leo. Her answer was negative (R. 35). Agent Moore testified in rebuttal that she had made this statement (R. 61).

(vi) Mrs. Rugendorf testified that the three white bags (into which most of the seized furs were placed by the officers) were not on the recreation room floor when the officers arrived, as Agent Moore had testified (*supra*, pp. 4–5), but were in the closet with the furs and not visible until the closet door was opened (R. 33, 36). She stated that when the bags were removed from the closet she told the officers she had never seen them before (R. 36). Agent Moore denied, in rebuttal, that the bags were in the closet, reiterating his testimony in chief that they were lying in plain sight on the floor of the room when the officers and Mrs. Rugendorf entered the basement (R. 62).

(vii) Mrs. Rugendorf was interviewed by Assistant United States Attorney Robert Monaghan at the latter's office on the day following the discovery

of the furs (R. 33, 59). She testified that Mr. Monaghan stated, among other things, that the government had learned about the presence of the furs in her basement from an informant who had given information on prior occasions; that the government knew her husband was not responsible for the furs' being there; and that both she and the government knew that it was her brother-in-law Leo who was responsible, since Leo was a well-known "fence" who had acted as such for two associates of his named Panzica and Condick (R. 33, 34, 37). Mr. Monaghan denied having made any of these statements to the witness (R. 59).

2. The proceedings on the motions to suppress and to require disclosure of the names of the government's confidential informants

The discovery of the furs was made in the course of a search pursuant to a commissioner's search warrant (R. 4–5, 15–16). Prior to trial, petitioner, pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure (Appendix, *infra*, p. 64), moved to suppress the use of the seized garments as evidence on the ground of alleged deficiencies in the affidavit supporting the warrant (R. 1–8). Following argument of counsel and an evidentiary hearing, the motion was denied (R. 17–25). Also denied was a motion to require the government to disclose the names of certain confidential informants, referred to in the affidavit, who had supplied information relied upon in part by the affiant officer as grounds for seek-

ing the warrant (R. 13–15). The relevant facts pertaining to these proceedings are as follows:

(*a*) The affidavit (R. 6–8) was executed on March 22, 1962,[4] by agent Moore. It stated that the affiant had reason to believe that about 80 fur garments, consisting of stoles and jackets approximating $40,000 in value, which had been stolen in Mountain Brook, Alabama, on or about February 10, 1962, were concealed in the basement of a single-family residence located at 3117 West Jarvis Avenue, in Chicago, Illinois (R. 6). The supporting grounds, as set forth in the affidavit, were as follows:

The affiant received a communication from Special Agent L. Dean Paarmann, of the Birmingham, Alabama, Office of the F.B.I., stating that on February 10, 1962, a burglary had taken place in Mountain Brook, Alabama, in which 82 fur garments, valued at approximately $42,044, were stolen (R. 6). Agent Paarmann's communication described the garments as consisting of mink, otter, and beaver stoles and jackets (the majority being mink) and reported that no full-length coats were among them (R. 6–7). Another F.B.I. agent, W. J. McCormick, advised the affiant that a confidential informant, who had furnished reliable information to the F.B.I. in the past, had told McCormick that Frank Schweihs, of Chicago, together with others, had committed the Alabama burglary; that, on or about March 1, 1962, James Kelleher, a Chicago police officer, had told McCormick

[4] This was also the date of the warrant and of the search pursuant thereto (R. 4–5, 15).

"that he saw FRANK SCHWEIHS at RUGGENDORF BROTHERS MEAT MARKET, managed by SAMUEL RUGGENDORF, at 2449 South Wentworth Avenue, Chicago, Illinois"; and that another confidential informant who had proved reliable in the past had told McCormick that Leo Rugendorf was a fence for Frank Schweihs, that Samuel Rugendorf was Leo Rugendorf's brother, and that Samuel was associated in the meat business with his brother (R. 7). A third F.B.I. agent, J. J. Oitzinger, notified the affiant that a confidential informant who had supplied the F.B.I. with reliable information in the past had told Oitzinger that Frank Schweihs, Tony Panzica, and Mike Condic were accomplished burglars who disposed of the proceeds of their burglaries through Leo Rugendorf. On March 16, 1962, a confidential and previously reliable informant told the affiant that he had seen approximately 75 to 80 fur garments in the basement of the home of Samuel Rugendorf, at 3117 West Jarvis Avenue, in Chicago, during the preceding week; that the garments he had seen consisted of mink, otter and beaver stoles and jackets (the majority being mink), from which the labels had been removed, and that no full-length coats were among them; and that the informant had been told the furs he had seen were stolen property. Finally, upon checking the informant's description against descriptions of furs taken in burglaries throughout the United States during the preceding six months, the affiant determined that the only reported burglary involving furs similar to those described by the

informant was the one which occurred in Mountain Brook, Alabama, on February 10, 1962 (R. 8).

(*b*) The motion to suppress challenged the validity of the affidavit on two grounds: (1) that it was untrue, and (2) that it was insufficient in law to establish probable cause for the issuance of a search warrant, in that it was based solely upon the belief of the affiant and "unsupported hearsay" (R. 2). Prior to the court's disposition of the motion, defense counsel, after the jury was empaneled but before the presentation of any evidence, orally moved that the government be required to supply the defense with the names of the confidential informants referred to in the affidavit (R. 13).

In the course of oral argument on the motions (R. 13–15; Tr. 9–26)—still prior to the commencement of the trial proper—defense counsel, citing this Court's decision in *Roviaro* v. *United States,* 353 U.S. 53, maintained "if the names of the informants are necessary to a proper defense or a proper presentation of the defendant's case in attacking the search warrant, then in the interest of justice it must be given to the defendant" (R. 13, as corrected at R. 75; Tr. 15). Counsel then proceeded to "demonstrate how in our opinion the names of the informants are necessary" (R. 13). The affidavit, counsel stated, contained (*ibid.*)—

> * * * certain factual errors. These facts, if they came from an informer, are false facts, so maybe they did not come from an informer, or, if they came from an informer then we are entitled now to cross examine the informer. May-

be he did not give the information, if the confidential informer is so wrong about the facts.

Two factual inaccuracies were cited by counsel—the statements that Samuel Rugendorf (petitioner) was the manager of Rugendorf Brothers Meat Market and that Samuel was associated in the meat business with his brother Leo (R. 14).[8] "Sam Rugendorf was not the manager of Rugendorf Brothers Meat Company," said counsel, and he had not been associated with the company since 1952—assertions which counsel offered to prove (*ibid.*).

In the course of his argument defense counsel declared (R. 14):

> They say, to get their search warrant, that a confidential informant who has furnished reliable information in the past to the Federal Bureau of Investigation told this affiant, Mr. Moore, who made the affidavit, told them on March 16, 1962 that he saw approximately 75 to 80 fur garments in the basement of the home of Samuel Rugendorf at 3117 West Jarvis, Chicago, Illinois, within the past week, that is, within the week prior to March 16.
>
> I would suggest that not only is this informant necessary to the defendant because if he takes the stand it will demonstrate that Sam Rugendorf had nothing to do with it, or possibly his falsity, but I would suggest that perhaps he would be a pretty good witness for the

[8] It will be noted that only the second of the statements referred to by counsel was attributed by the maker of the affidavit to an *unnamed* informant. See *supra*, pp. 12–13, and *infra*, pp. 48–49.

Government, that they ought not to want to hide the witness, that he would pretty much make out a case for the Government.

Government counsel, in opposing the motion to compel disclosure of the names of the confidential informants, represented to the court, and offered to present testimony, that if the government were to reveal the identities of any confidential informants "they might and probably would be killed" (R.15).

At the conclusion of the argument, the court denied the motion to require disclosure of the names of the informants, denied the motion to suppress insofar as it challenged the legal sufficiency of the affidavit, and reserved ruling on the motion to suppress insofar as it attacked the affidavit's truthfulness (R. 15; Tr. 26–27).

(*c*) The prosecution thereupon presented its case in chief (R. 15–17). At its conclusion, but prior to the admission in evidence of the seized furs, the jury was again excused and a hearing held on the reserved aspect of the motion to suppress, *i.e.*, the charge that the affidavit supporting the warrant was false (R. 17–25). The evidence adduced at this hearing was, in pertinent part, as follows:

Petitioner was not the manager of Rugendorf Brothers Meat Market and was not associated in the meat business with his brother Leo (R. 19, 20, 21). The market bearing that name was a corporation whose manager and principal current owner was one Max Siegel, a brother-in-law of petitioner and Leo (R. 21; Tr. 112–113). While Leo was a sales-

man for the market, he had no proprietary interest in it (R. 21; Tr. 113). Petitioner owned and operated, in partnership with his wife and son Jerome, a different meat market, with which Leo had no connection (R. 18–19). Aside from occasional purchases from Rugendorf Brothers Meat Market, petitioner had had no connection with that business since approximately 1952, at which time the market of that name was located at a different address (R. 19, 20, 21). Prior to 1952 petitioner had been the owner of Rugendorf Brothers Meat Market (R. 19; Tr. 87–88).*

With respect to the affiant's statement that he had been told by Agent McCormick that Chicago police officer James Kelleher had reported seeing "FRANK SCHWEIHS at RUGGENDORF BROTHERS MEAT MARKET, managed by SAMUEL RUGGENDORF, at 2449 South Wentworth Avenue * * *" (R. 7; *supra*, pp. 12–13), Officer Kelleher testified that, although he did tell McCormick that he had seen Schweihs at the market in question, he did not say the market was managed by Samuel Rugendorf (R. 17). Following Kelleher's testimony, defense counsel indicated to the court that in the light of Kelleher's testimony it would be necessary to question Agent McCormick in order to determine the source of the erroneous information that Samuel Rugendorf was the manager of the market, but that McCormick was in the hospital (R. 18). No continuance was sought, however, nor did counsel

* Petitioner subsequently further explained, at the trial proper, that from 1947 to 1952 he and his brother Leo had been associated together in the meat business—whence the name Rugendorf Brothers (Tr. 253–254).

request that the testimony be obtained by deposition.[7]

Following argument of counsel (R. 22–25), the court denied the motion to suppress (R. 25). In response to defense counsel's argument that he had "demonstrated the falsity" of the affidavit by showing that petitioner did not manage Rugendorf Brothers Meat Market and that Officer Kelleher had not so stated to agent McCormick, the court replied that "Even if part of the affidavit should be false, the main part of it, the material part, is true, because they actually found the garments there" (R. 24–25).

(*d*) In the course of this second hearing on the motion to suppress, the defense again attempted, through questions directed to agent Moore (whom it called as a witness) to ascertain the identity of the informant who reported to Moore that he had seen furs in petitioner's basement during the week preceding March 16, 1962 (R. 22). The court sustained government objections to these questions, including a question as to where the agent's conversation with the informant took place and the exact day on which the informant had seen the furs (*ibid.*).[8]

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[7] Counsel merely said, "I say that I am in difficulty. I don't know what to do with respect to that, but I will proceed" (Tr. 83). He then proceeded with the calling of other witnesses (R. 18–22).

[8] Government counsel objected to the question as to the place of the conversation on the ground that "to reveal the place of the conversation would be to reveal the identi[t]y of the informant," counsel again representing to the court that disclosure of the names of the informants "would cause a possible murder" (R. 22; Tr. 118–119). The prosecutor objected, for the "same reason," to the question as to the day on which the informant saw the furs (R. 22).

Following these rulings by the court, a colloquy ensued in which defense counsel argued to the court that he needed the information as to the specific day on which the informant saw the furs in order to defend his client (R. 22–24). Counsel argued that he had to "account for the activities of Sam Rugendorf on the day the confidential informant says he saw" the furs in petitioner's basement (R. 23). The court replied that if the government ever offered the informant as a witness the defense would be fully informed, and pointed out to counsel that the government had stated that it would not use the informant as a witness. Counsel said, "I understand, but I need that information to defend my defendant, your Honor" (R. 23). Citing *Roviaro* v. *United States*, 353 U.S. 53, counsel argued that the defense was entitled to some information about the informant, and that "even if the Court denies my motion that we be given his name, denies the motion about where the conversation took place, can we at least not have the date on when it took place so Sam Rugendorf can defend himself?" (R. 24). The court, however, adhered to its original ruling, the trial on the merits was resumed in the presence of the jury and the defense proceeded to put in its evidence (R. 25 *ff.*).

As pointed out above (pp. 5–7), the defense consisted, *inter alia*, of testimony by petitioner and his wife that neither had any knowledge of the presence of the stolen furs in their basement until the discovery of the garments by the F.B.I. agents under a search warrant, and the argument that petitioner's

brother Leo must have placed the furs in the basement without petitioner's knowledge or consent. At no point during the trial itself did defense counsel raise any further question as to the identity of the confidential informant who had reportedly seen the furs in the basement.

SUMMARY OF ARGUMENT

I

Petitioner's contention that the affidavit in support of the search warrant failed to establish "probable cause," in that it was founded on "hearsay", is disposed of by *Jones* v. *United States*, 362 U.S. 257, 267–272. There it was held that a search warrant is not invalid merely because the supporting affidavit is based on the reported observations of others, so long as there is a substantial basis for crediting the information. Here, as in *Jones*, the face of the affidavit disclosed substantial grounds for believing the information relied upon. Petitioner's attempt to distinguish *Jones* on the ground that there the corroborating data included a fact personally known to the affiant is without substance.

II

A. We deal next with petitioner's contention that he was entitled to the names of the confidential informants referred to in Agent Moore's affidavit, for the purpose of suppressing evidence obtained by the search. The identity of the informants is not relevant to the issue of the legal sufficiency of the affidavit on its face, but only to the question whether the affiant

misrepresented to the Commissioner his basis for seeking the warrant—*i.e.*, whether he procured the warrant by fraud. *Jones* v. *United States, supra.*

B. It is our basic position that one who demands the disclosure of confidential informants for the alleged purpose of showing that the warrant was procured by fraud must first come forward with some evidence indicating that a fraud has in fact been committed upon the magistrate. A contrary holding would accord no weight to the important public policy which underlies the government's historic privilege "to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law." *Roviaro* v. *United States,* 353 U.S. 53, 59. The privilege, as we show, is an essential prerequisite to enlisting the cooperation and assistance of confidential informants. In its absence, law-enforcement officials could not assure the anonymity of those sources and thereby shield them from reprisals at the hands of those whose criminal activities they expose. Nothing could more swiftly choke off the sources of information available to the law-enforcement community than to deprive it of the authority to give this assurance. We submit that the interest of the public in keeping open the government's channels of information is entitled to greater respect than the defendant's interest in conducting a fishing expedition on the off-chance of turning something up.

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The decisions requiring disclosure of informants where the issue is "probable cause" for a search without a warrant are distinguishable; the government's privilege has a far stronger claim to recognition where, as here, a warrant has been obtained. In the latter case, the accused is not dependent solely upon the district court for the protection of his Fourth Amendment rights. The magistrate has already provided a bulwark against official irresponsibility. The showing of "probable cause" which an officer makes in an affidavit prior to a search is, for several reasons, less likely to overstate or embellish the evidence than one which he formulates for the first time in a suppression hearing subsequent to a search without warrant.

C. (1) In the present case, petitioner made no showing which would justify an exception to the privilege. He offered no proof, and indeed made no allegation, which cast the slightest doubt upon the crucial representation in the affidavit—*i.e.*, that a previously reliable informant had seen 75 to 80 unlabeled furs in his basement. If anything, the theory of the defense tended to confirm that representation. And the description of the furs included details that could only have been known by one who actually saw the garments in the Rugendorf basement.

The two minor inaccuracies in the information described in the affidavit in no way impugn the affiant's veracity. First, the items in question were not presented as facts within the affiant's own knowl-

edge; both were communicated to him by others. Second, both items were, at most, of peripheral relevance to the showing of probable cause. Third, there is no reason to believe that either inaccuracy was anything more than an honest, and quite natural, mistake of fact.

(2) If the trial court was correct in refusing to compel the identification of the informant who saw the furs in petitioner's basement, by the same token the court properly sustained government objections to questions (the date on which the informant saw the furs and the place of his conversation with Agent Moore) which, if answered, might have had that same consequence.

III

Petitioner also urges that he was entitled to the name of the informant who saw the furs in order properly to defend himself on the merits. He suggests that the informant, by testifying as to the circumstances in which he gained admission to the house, would almost certainly establish petitioner's guilt or innocence. Had this claim been adequately asserted in the district court, it might well have justified disclosure under *Roviaro* v. *United States*, *supra*. But petitioner did not properly raise in the trial court the issue whether he was entitled to disclosure for purposes of his defense on the merits. Still less did he articulate the supporting theory on which he now rests that claim.

The demands for identification of the confidential

informants were, without exception, made in connection with the proceedings on the motion to suppress, at a time when the principal focus of inquiry was the validity of the search. In this context, such allusions as there were to the possible utility of the information in connection with defense on the merits were too oblique to apprise the court of the nature of petitioner's claim. Indeed, there is reason to believe that the argument now advanced did not even occur to defense counsel until long after the trial was over.

Petitioner also demanded, for purposes of defense, the exact date on which the informant claimed to have seen the furs. But, as to this information, he fails to meet the *Roviaro* test—*i.e.*, he cannot show that the knowledge would have materially aided his defense.

IV

The evidence was clearly sufficient to support the conviction. Where a defendant is found in possession of stolen property a short time after the theft, and comes forward with no satisfactory explanation, it is well settled that the jury may infer the element of guilty knowledge. *Wilson* v. *United States*, 162 U.S. 613, 619. Here the jury was plainly entitled to reject the proffered explanation—one that required it to believe that a thief or receiver would deposit a large number of "hot" furs in the closet of a regularly used basement recreation room in the home of a completely innocent and unknowing third person, *i.e.*, a person who could be expected to call the police the moment he chanced upon the loot.

ARGUMENT

I

THE SEARCH WARRANT WAS VALID SINCE THE SUPPORTING AFFIDAVIT, THOUGH BASED ON THE OBSERVATIONS OF OTHERS, SHOWED ON ITS FACE SUBSTANTIAL GROUNDS FOR CREDITING THE INFORMATION

In *Jones* v. *United States*, 362 U.S. 257, 267–272, this Court held that a search warrant is not invalid merely because the supporting affidavit is based on the reported observations of others, so long as there is a substantial basis for crediting the information. That holding is dispositive of petitioner's contention that the affidavit in the instant case was legally inadequate because founded on hearsay (Pet. Br. 31–35). For here, as in *Jones*, the face of the affidavit disclosed substantial grounds for crediting the information relied upon.

The affidavit stated, in pertinent part, that the officer-affiant had received a communication from a named agent attached to the Birmingham Office of the F.B.I. reporting that 82 fur garments, consisting of approximately $42,044 worth of mink, otter, and beaver stoles and jackets (the majority being mink, and there being no full-length coats among them), had been stolen in a burglary in Mountain Brook, Alabama, on a specified date approximately six weeks previously; that the affiant had further been told, six days prior to the date of the affidavit, by a confidential informant who had furnished reliable information to the F.B.I. in the past, that he had seen, during the week preceding his report to the affiant, approximately 75 to 80 fur garments, consisting of

mink, otter, and beaver stoles and jackets (the majority being mink, and there being no full-length coats among them), in the basement of petitioner's home in Chicago; that the informant had further told the affiant that the labels of the garments had been removed and that he had been told that the furs had been stolen; that the affiant had compared the description of the furs reportedly seen by the informant with the descriptions of furs taken in burglaries throughout the United States during the preceding six months and that the only reported burglary involving furs similar to those described by the informant was the one which had occurred six weeks previously in Mountain Brook, Alabama (R. 6–8; *supra*, pp. 12–14). While additional corroborative details were included in the affidavit, the foregoing were plainly enough to give probable cause for the belief (a) that stolen property was concealed in petitioner's house, and (b) that the property was the fruit of an out-of-state theft.

Here, as in *Jones*, the information which led to the warrant's issuance came from an unnamed confidential informant. Here, as there, specific reasons for crediting the informant's story were cited in the affidavit. In both cases the corroborative support included the fact that the informant had given accurate information in the past. In the instant case, indeed, the grounds for believing the informant's report were far stronger than in *Jones*. There, the property reportedly seen in the accused's apartment, heroin, was described by the informant in the most general terms—simply by means of its generic name.

Here, on the other hand, the merchandise seen in petitioner's basement was described in great detail. This description, the agent found, corresponded almost exactly with the description of the fruits of a known theft, committed six weeks earlier and independently reported to the affiant through regular F.B.I. channels. Since there was no reason for the informant to know of the missing furs, the affiant could confidently conclude that his informant had in truth seen what he claimed to have seen in the basement of petitioner's home, and that his story was not a falsification.

Petitioner's attempt to distinguish *Jones* on the ground that there the bases for crediting the information included a fact personally known to the officer-affiant (*i.e.*, that Jones and the woman with whom he shared the apartment were users of narcotics) (Pet. Br. 33) is wholly without merit. The proposed distinction can hardly be reconciled with the Court's observation, crucial to the rationale of the *Jones* decision, that "[i]f an officer may act upon probable cause without a warrant *when the only incriminating evidence in his possession is hearsay* [referring to *Draper* v. *United States*, 358 U.S. 307], it would be incongruous to hold that *such evidence presented in an affidavit* is insufficient basis for a warrant" (362 U.S. at 270; emphasis added). Fundamentally, the test laid down in *Jones* is whether the secondary information relied upon by the affiant has a substantial claim to credibility, not whether that claim happens to derive from facts personally known to the officer. While the Court did point out, in the course

of its discussion, that Jones was known "by the police"* to be a user of narcotics (362 U.S. at 271), it did not single out that factor as having special significance. And, in any event, the factor has its counterpart in the present case. Here, too, facts disclosed by the informant (the description of the furs in the basement) were corroborated by facts independently obtained by the affiant through regular and official F.B.I. channels (the description of the garments involved in the Alabama burglary).

Finally, the contention that the corroborative prop for an informant's report must include something personally known to the affiant is refuted by the very nature of probable cause. "In dealing with probable cause, * * * as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Brinegar* v. *United States*, 338 U.S. 160, 175. Information reported by others, as has been cogently observed, while generally inadmissible in a court of law, is "the kind of information by which

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*It is not clear from the affidavit in *Jones* whether the affiant, as distinguished from other officers of the narcotics squad, had *personal* knowledge that the occupants of the apartment were narcotics users. The relevant language of the affidavit was as follows: "Both the aforementioned persons [Jones and the woman with whom he lived] are familiar to the undersigned and other members of the Narcotic Squad. Both have admitted to the use of narcotic drugs and display needle marks as evidence of same" (362 U.S. at 267, n. 2). The affidavit did not state that the admissions referred to were made personally to the affiant or that the affiant had witnessed the needle marks himself.

most of us live and through which we govern most of our daily life * * *." Harney and Cross, *The Informer in Law Enforcement* (1960), p. 15. The degree of credit to which such intelligence is entitled may depend upon a variety of factors, including the known reliability of the informant, the manner in which the informant himself obtained the data, and the existence of corroboration from other secondary sources.[10] Whether the disclosure is confirmed by facts within the personal knowledge of the agent called on to evaluate it is another relevant factor, and may in some circumstances be decisive. But the absence of personal corroborative knowledge does not automatically render the information unworthy of belief. That depends on all of the circumstances—the significance of each element of the entire situation in the light of human experience.

II

PETITIONER WAS NOT ENTITLED TO THE NAMES OF THE GOVERNMENT'S INFORMANTS FOR PURPOSES OF SUPPRESSING EVIDENCE OBTAINED BY THE SEARCH

Petitioner urges that he was entitled to the names of the informants referred to in Agent Moore's affidavit, despite the government's traditional privilege not to reveal the identity of its confidential sources and

[10] A familiar example of information reported by others which can reasonably be credited, though wholly uncorroborated by personal knowledge, and though the factor of known prior reliability is also absent, is the reporting of the same event or occurrence by two or more persons known to be independent. The several sources of information in such a situation, by corroborating *one another*, minimize or may even eliminate the possibility of error or untruth. Cf. Harney and Cross,

thereby expose them to possible retaliation. Petitioner demanded those names—particularly that of the informant who claimed to have seen the furs—in the course of the pre-trial proceeding on the motion to suppress the evidence obtained by the search. He renewed the demand in the further hearing on the motion to suppress which immediately followed the government's case-in-chief. In addition, petitioner requested certain collateral information relating to the informant who saw the furs—specifically, the date on which he allegedly saw them and the place at which the intelligence was communicated to Agent Moore. The trial court denied the request and sustained the privilege.

Petitioner claims that he had a right to the names for two reasons: (1) because the testimony of the informants might aid him in showing that the items of evidence sought to be suppressed (the furs) were the fruits of an unlawful search and seizure; and (2) because the testimony might be helpful to his defense on the merits. The two asserted reasons present separate legal issues. In *Roviaro* v. *United States*, 353 U.S. 53, 60–61, this Court held that in appropriate circumstances the government's privilege must give way where "the disclosure of an informer's identity * * * is relevant and helpful to the defense of an accused * * *." But the Court has not defined the standard to be ap-

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op. cit. supra, p. 15: "[S]eparate pieces of hearsay information from entirely independent sources, which triangulate on the same suspect, may point to his guilt with Euclidean exactitude." See also *Jones* v. *United States*, *supra*, 362 U.S. at 271, and cf. *supra*, p. 27.

plied where the names of the informants are sought for the purpose of challenging the validity of a search conducted pursuant to a duly issued search warrant. We turn now to that question."[11]

A. In this aspect, the identity of the informants is relevant only to the question whether the affidavit in support of the search warrant contains material misrepresentations

At the outset it is important to define the precise aspect of the search and seizure issue upon which the testimony, and hence the identity, of the informants may have bearing. The point to be stressed is that disclosure of the government's confidential sources can be justified, if at all, only for the narrow purpose of enabling the accused to show that the affidavit supporting the search warrant contains material misrepresentations—in effect, that the warrant was procured by fraud. In *Jones* v. *United States, supra,* this Court rejected the contention that a search warrant is vitiated by the failure of the affiant officer to identify his informants, where the sole issue is the legal sufficiency of the affidavit on its face[12] (the issue

[11] The separate question whether petitioner was entitled to the names in aid of his defense is discussed in Point III, *infra.*

[12] The Court stated (362 U.S. at 271–272) that: "If the objections raised were that Didone [the affiant] had misrepresented to the Commissioner his basis for seeking a warrant, these matters might be relevant. Such a charge is not made. All we are here asked to decide is whether the Commissioner acted properly, not whether Didone did. We have decided that, as hearsay alone does not render an affidavit insufficient, the Commissioner need not have required the informants or their affidavits to be produced, or that Didone have personally made inquiries about the apartment, so long as there was a substantial basis for crediting the hearsay."

discussed in Point I, *supra*). The Court held that the identity of the informants is not relevant to the issue of "probable cause" as such—the propriety of the Commissioner's action in issuing the warrant—but only, at most, to the question whether the officer who executed the affidavit engaged in fabrication. That question, left open in *Jones*, is squarely presented here, for petitioner's motion to suppress explicitly attacked the veracity of the affidavit (*supra*, p. 14).

This Court has never had occasion to decide the extent to which a trial court may look behind a search warrant which (a) is valid on its face and (b) was duly issued by a magistrate on the basis of an affidavit which, on its face, meets the standard of "probable cause" laid down in *Jones*. There is good reason to believe that such a warrant, as well as the ensuing search, should be accorded a conclusive presumption of validity, much like the indictment duly returned by a grand jury. See *Costello* v. *United States*, 350 U.S. 359. We find it unnecessary to urge that proposition here. For purposes of this argument we assume that the trial court, in ruling upon a motion to suppress, may properly consider evidence designed to show that the affidavit supporting the warrant was executed in bad faith and contains material misrepresentations.[13]

[13] This is not to say, of course, that the search would be vitiated merely if the information upon which the affiant relied ultimately proved to be false. The officers do not vouch for the accuracy of the information but only for the prior reliability of their source. The controlling test, established by this Court, is whether "the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to war-

B. The government is not required to betray its confidential sources unless independent evidence casts serious doubt upon the integrity of the representations in the affidavit

1. The government's privilege not to identify its confidential informants is fundamental to effective law enforcement and should give way only where compelling justification is shown

It is our basic position that one who demands disclosure of the government's confidential sources in order to show that a search warrant was obtained by misrepresentation must show that there is reason for apprehending that a fraud has in fact been committed upon the magistrate. To hold otherwise would give no weight to the important public policy which underlies the government's historic privilege "to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law." *Roviaro* v. *United States*, 353 U.S. 53, 59. This privilege, the roots of which lie deep in the soil of English law,[14] has often been referred to in the decisions of this

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rant a man of reasonable caution in the belief that" the described property will be found at the described premises. *Carroll* v. *United States*, 267 U.S. 132, 162; *Brinegar* v. *United States*, 338 U.S. 160, 175–176; *Draper* v. *United States*, 358 U.S. 307, 313. Thus, if the affidavit is legally sufficient on its face, the only question which might remain open in a suppression proceeding is not whether the affiant was misinformed, but whether he misrepresented to the magistrate the basis and extent of his information. It is in relation to that question alone that the defendant's right to compel disclosure of the government's sources must be assessed.

[14] See, *e.g.*, *Rex* v. *Akers*, 6 Esp. 125, 170 Eng. Rep. 850 (1790); *The Trial of Thomas Hardy*, 24 How. St. Tr. 199, 808–809, 816, 818, 819 (1794); *Hqme* v. *Bentinck*, 2 Brod. & B. 130, 162, 129 Eng. Rep. 907, 920 (1820); *Attorney-General* v. *Briant*, 15 M. & W. 169, 184–185, 153 Eng. Rep. 808, 814–815 (1846); *Marks* v. *Beyfus*, L.R. 25 Q.B.D. 494, 498, 500 (1890).

Court. See *Vogel* v. *Gruaz*, 110 U.S. 311, 316; *In re Quarles and Butler*, 158 U.S. 532, 535–536; *Scher* v. *United States*, 305 U.S. 251, 254; *Roviaro* v. *United States*, *supra*. Its essential purpose, as the Court observed in *Roviaro*, is the furtherance and protection of the public interest in effective law enforcement (353 U.S. at 59). The privilege "recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, *by preserving their anonymity*, encourages them to perform that obligation" (emphasis added). *Ibid.*

With the emergence of organized crime on an unprecedented scale, the interest of society in protecting and fostering the privilege has become increasingly evident. To be sure, the informer is less likely than in former days to be a citizen of blameless reputation who, having chanced to learn of the commission of an offense, reports what he knows to the proper authorities out of a sense of civic duty. More often he is himself a member of the criminal classes or an associate of criminals, who elects, for one of a variety of reasons (see Harney and Cross, *The Informer in Law Enforcement* (1960), pp. 32–38), to cooperate with enforcement authorities.

But whether the informer acts out of a sense of civic obligation or responds to some less worthy motive, the maintenance of his anonymity is a critical factor in encouraging him to come forward and report what he knows. To those for whom crime is a way of life, the informer is the most feared and hated of persons. He "is the underworld's most dangerous

threat," "the Achilles heel of the single thief, the ticking time bomb which might explode to blow apart the small mob or big organized crime." Harney and Cross, *op. cit. supra*, p. 4. Not surprisingly, therefore, the ability of enforcement officials to give the informer appropriate assurance of anonymity is often an essential prerequisite to inducing his assistance and cooperation. Nothing could more swiftly choke off the sources of information available to the law-enforcement community than to deprive it of authority to give such assurance. If an officer were routinely required to divulge the sources of his confidential information, then, as an English authority has observed, "the ultimate and undoubted effect would be to discourage informants and to make the protection of the public very much more difficult than it is." Lord MacDermott, Hamlyn Lectures, 1957, quoted in *Crime and Crown Privilege*, The Criminal Law Review (January 1959), p. 16. For the same reason Attorney General Jackson regarded "the keeping of faith with confidential informants as an indispensable condition of [the F.B.I.'s] future efficiency." 40 Op. Atty. Gen. 45, 46–47 (1941).

The problem is particularly acute in the field of narcotics. It is a matter of common knowledge among enforcement personnel that one who has dealt in narcotics literally risks his life in volunteering to inform on his associates. "Once an informant is known," as Mr. Justice Clark observed in *Roviaro* v. *United States*, *supra*, 353 U.S. at 67 (dissenting),

> the drug traffickers are quick to retaliate. Dead men tell no tales. The old penalty of tongue

removal, once visited upon the informer Larunda, has been found obsolete.

The dimensions of the problem can be discerned from the opinion in *United States* v. *Estep*, 151 F. Supp. 668, 673 (N.D. Tex.), where Chief Judge Davidson took judicial notice of the fact that a number of narcotics informers who had appeared in his court had been murdered or viciously attacked. Twenty-four instances of murder, and one in which the victim was left to die but recovered, were cited. The methods by which the victims met their deaths ran the gamut from shooting to drowning, and included beating, stabbing, and throat-slashing. The government, regrettably, could add a lengthy supplement to the list compiled by the district court—from incidents, known to the Department, from every section of the country.[15] These instances from a single judicial district

[15] In addition, reported decisions involving the murder or foul treatment of informers from an imposing and ever-growing segment of our legal literature. See *e.g. United States* v. *Saunders*, n. 1 (Nos. 15263 and 15264, decided January 3, 1964) (C.A. 6) (narcotics informant, expected to be chief prosecution witness, murdered prior to trial; trial court found that killing had "direct relationship to the prosecution and trial of this case"); *Ferina* v. *United States*, 302 F. 2d 95, 97, 99, 102–103 (C.A. 8), certiorari denied *sub nom. Cardarella* v. *United States*, 371 U.S. 819 (narcotics informant, a grand jury witness, shot in stomach, back, and head by person whom he heard say, "Here's something from Tony"); *United States* v. *Partutian*, 319 F. 2d 661, 663 (C.A. 2), certiorari denied January 6, 1964 (No. 540 Misc.) (narcotics informant "disappeared" after supplying narcotics agent with information leading to fruitful search; agent advised court that in his opinion informant had been murdered); *United States* v. *Bando*, 244 F. 2d 833, 835–836, 837 (C.A. 2), certiorari denied, 355 U.S. 844 (acid-blinding of Victor Riesel,

adequately suggest, however, for present purposes, the gravity of the fear of retaliation.

To be sure, the informant privilege, important as it is, is not without limitations. If, in particular circumstances, giving effect to the privilege collides unavoidably with a social interest of even greater dignity, the privilege must yield. In *Roviaro*, for example, the government's confidential informant was present at, and the sole participant (other than the accused) in, the very crime charged in the indictment (a narcotics offense). He was the only witness in a position to amplify or contradict the testimony of the government's witnesses, one of whom testified that the informant had denied ever having seen the accused. The Court concluded that "*under these circumstances*, the trial court committed prejudicial error in permitting the Government to withhold the identity of its undercover employee * * *" (353 U.S. at 65; em-

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a witness in a grand jury "rackets" investigation, by hireling who was himself subsequently murdered); *Carbo* v. *United States*, 288 F. 2d 686, 687, 689 (C.A. 9), certiorari denied, 365 U.S. 861 (threats against, and physical assault upon, government's principal witness in extortion case; see also *Carbo* v. *United States*, 314 F. 2d 718, 743–744 (C.A. 9), pending on petitions for writs of certiorari *sub nom. Palermo, et al.* v. *United States*, Nos. 122, 134, 141 and 145 (same case on appeal from convictions); and see *Carbo* v. *United States*, 82 S. Ct. 662, 667–669, 7 L. Ed. 2d 769, 775–777, review denied, 369 U.S. 868 (opinion of Mr. Justice Douglas denying bail pending appeal)); *Odom* v. *United States*, 116 F. 2d 996, 998 (C.A. 5), reversed on other grounds, 313 U.S. 544 (beating of, and threat to kill, witness at injunction hearing arising out of labor dispute); *Schuster* v. *City of New York*, 5 N.Y. 2d 75 (1958) (murder of informant who supplied information which led to arrest of the notorious Willie Sutton).

phasis added). "Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause," the Court declared, "the privilege must give way" (353 U.S. at 60–61). But the Court made it clear that the decision was narrowly based, and that no general erosion of the privilege was intended. It stressed that (*id.* at 62)—

> We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors.

In short, no hard-and-fast prescription can be laid down as to the necessity for disclosure even where an accused may plausibly insist that he needs the information as an aid to his defense. Still less should there be an automatic rule of disclosure where the information is sought for the purpose of suppressing evidence under authority of a duly issued search warrant.

We maintain, therefore, that the government should in no event be required to betray its confidential sources, and thereby expose them to reprisal, unless the accused has come forward with independent evi-

dence casting substantial doubt upon the integrity of the affidavit. Under a contrary holding almost nothing would be left of the privilege. If the names of informants must be laid bare to every defendant who makes an unsupported allegation of fraud in the procurement of the warrant, persons cooperating with law-enforcement officials would be deprived of all meaningful protection and hence discouraged from giving further assistance. Clearly, we submit, the interest of the public in keeping open the government's channels of information is entitled to greater respect than the defendant's interest in conducting a fishing expedition on the off-chance of turning something up. Accordingly, to justify an exception to the privilege, there must at least be shown a reasonable basis—"probable cause," as it were—for believing that the affidavit contains material misrepresentations. Cf. *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 400 (holding that an accused must show "a particularized need" for grand jury minutes, which "outweighs the policy of secrecy," before he may have access to the minutes for impeachment purposes).

2. The decisions requiring disclosure of informants in the case of a search without warrant are distinguishable

Until now the question of the government's duty to identify its informants has arisen almost exclusively in cases involving searches without a warrant, where the showing of probable cause is founded upon information received from a confidential source. It is well settled that where officers, acting on such information, undertake an investigation of their own

and thereby obtain sufficient firsthand intelligence to constitute probable cause independently of the initiating information, disclosure is not required.[16] On the other hand, where confidential information is the sole basis for the search, or at least an indispensable element of that basis, the decisions are in conflict.[17]

Whatever may be its status in the case of a search without warrant, the government's privilege has a

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[16] *Scher* v. *United States*, 305 U.S. 251, 254; and see, *e.g.*, *Mosco* v. *United States*, 301 F. 2d 180, 189 (C.A. 9), certiorari denied *sub nom. Hansen* v. *United States*, 371 U.S. 842; *Miller* v. *United States*, 273 F. 2d 279, 281 (C.A. 5), certiorari denied, 362 U.S. 928; *Pegram* v. *United States*, 267 F. 2d 781 (C.A. 6); *McQuaid* v. *United States*, 198 F. 2d 987, 990 (C.A. D.C.), certiorari denied, 344 U.S. 929; *Cannon* v. *United States*, 158 F. 2d 952, 954 (C.A. 5), certiorari denied, 330 U.S. 839; *Shore* v. *United States*, 49 F. 2d 519, 522–523 (C.A. D.C.), certiorari denied, 283 U.S. 865; *Segurola* v. *United States*, 16 F. 2d 563, 565 (C.A. 1), affirmed on other grounds, 275 U.S. 106.

[17] Sustaining the privilege: *McInes* v. *United States*, 62 F. 2d 180 (C.A. 9), certiorari denied, 288 U.S. 616; *United States* v. *Li Fat Tong*, 152 F. 2d 650, 652 (C.A. 2); *Nichols* v. *United States*, 176 F. 2d 431, 433 (C.A. 8), affirming *United States* v. *Nichols*, 78 F. Supp. 483, 486–487 (W.D. Ark.). See also *Shore* v. *United States*, 49 F. 2d 519, 522–523 (C.A. D.C.), certiorari denied, 283 U.S. 865 (*dictum*); *Cannon* v. *United States*, 158 F. 2d 952, 954–955 (C.A. 5), certiorari denied, 330 U.S. 839 (*dictum*); *Jones* v. *United States*, 271 F. 2d 494, 495 (C. A. D.C.), certiorari denied, 362 U.S. 944 (demand for disclosure not timely made). And compare this Court's *dictum* in *Scher* v. *United States*, 305 U.S. 251, 254: "Moreover, as often pointed out, public policy forbids disclosure of an informer's identity unless essential to the defense, as, for example, where this turns upon an officer's good faith" (the decision *held* that the officers had personally seen and heard enough to justify the search independently of the confidential information). Requiring disclosure: *Wilson* v. *United States*, 59 F. 2d 390, 392 (C.A. 3); *Costello* v. *United States*, 298 F. 2d 99, 101 (C.A. 9); *United States* v. *Robinson* (No. 28090, decided December 18, 1963) (C.A. 2); *United States* v. *Blich*, 45 F. 2d 627, 629

far stronger claim to recognition where, as here, the search was conducted pursuant to a warrant. The distinction is recognized even by the authorities which most firmly insist upon the necessity for disclosure in the former situation. *United States* v. *Robinson* (No. 28090, decided December 18, 1963) (C.A. 2); *Costello* v. *United States*, 298 F. 2d 99, 102 (C.A. 9). And in a recent decision involving a search pursuant to a warrant, issued on the basis of an affidavit which had heavily relied on information from confidential sources, the Court of Appeals for

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(D. Wyo.); *United States* v. *Keown*, 19 F. Supp. 639, 645–646 (W.D. Ky.).

In *Roviaro* v. *United States*, 353 U.S. 53, 61, this Court remarked that "[m]ost of the federal cases involving this limitation on the scope of the informer's privilege"—*i.e.*, that the privilege must give way where disclosure is essential to fair determination of a cause—"have arisen where the legality of a search without a warrant is in issue and the communications of an informer are claimed to establish probable cause," and the Court added that "In these cases the Government has been required to disclose the identity of the informant unless there was sufficient evidence apart from his confidential communication." As we note in the text, however, the decisions are actually in conflict on the point. We would suggest, moreover, that the *Li Fat Tong* decision, *supra*, which this Court included among the cases cited in support of its above-quoted *dictum*, actually is authority for the opposite view. It is true that the court in that case said that "Any suggestion that the evidence on which probable cause rested was derived wholly from unidentified informers, even if that fact be regarded as critical, is not borne out by the record" (152 F. 2d at 652). But the court went on to acknowledge that the critical information, without which there obviously would have been no probable cause, *viz.*, that the accused was carrying smoking opium, did originate with an unidentified informant (*ibid.*), whose identity the court nevertheless held need not be disclosed.

the District of Columbia Circuit held that divulgence of the identity of the informants was not required. *Walker* v. *United States*, n. 4 (Nos. 17897 and 17898, decided November 14, 1963).[12] See, also, *United States* v. *Whiting*, 311 F. 2d 191, 195–196 (C.A. 4), certiorari denied, 372 U.S. 935 (where, however, the confidential information had been strongly corroborated by the officers' own observations).

The interest of the government in withholding the names of its informants is equally great in either case. But the interest of the defendant in obtaining those names—or rather the danger of official overreaching if the informants are not identified—is much less significant in a case where a search warrant has been obtained. In such a case, the accused is not dependent solely upon the district court for the protection of his Fourth Amendment rights. The magistrate who passes upon the application for the warrant provides an additional and effective bulwark against official irresponsibility. Where resort is had to a warrant, "evidence in the possession of the police

[12] The court stated that it had no occasion to define the precise limits of the privilege in the case before it; remarking that the "exception to" the privilege, there invoked by the accused, had been claimed by the appellants in their brief "in terms of the assumption that the factual evidence of probable cause [in that case] 'consisted *entirely* of the hearsay statements of three unidentified, faceless and nameless informers,'" the court said that it did "not so view the record" (*ibid.*; emphasis in the original). Although the evidence of probable cause relied on by the applicant for the warrant did not, as the court observed, consist entirely of the information from unnamed sources, such information nevertheless formed an indispensable part of the evidence. The case is thus identical with the present case in relevant part.

[is] weighed by an independent judicial officer, whose decision, not that of the police, [governs] whether liberty or privacy is to be invaded." *Jones* v. *United States, supra*, 362 U.S. at 270–271. Equally important, the showing of "probable cause" which an officer makes in an affidavit *prior* to the search is less likely to overstate or embellish the evidence than one which he formulates for the first time in a suppression hearing subsequent to a search without warrant. In the latter case, the search is a *fait accompli* and the officer is under pressure to justify what he has done. Moreover, a successful search without warrant, though it may actually have been inspired by a mere "hunch" or a tip from an unknown informant, may appear in retrospect to have been more soundly based. Thus, having caught the defendant "red-handed", as it turned out, the officer may honestly deceive himself as to the extent of his foreknowledge. In reconstructing his prior information, he may include facts which were brought to light by the search itself, or may claim for his informant a reliability which became evident only after the fact. In sum, hindsight, wishful thinking, and the officer's natural desire for self-vindication may occasionally supply elements of "probable cause" which in reality were missing.

Where a warrant is obtained, these dangers are greatly minimized, if not eliminated. Since the officer must specify in the affidavit the articles he expects to find, he cannot rely upon hindsight to identify the objects of the search. That alone fully protects the accused against that most flagrant of Fourth

Amendment violations—the general exploratory search which has no definite object. Moreover, an agent who submits a sworn affidavit to a magistrate knows that he may be interrogated as to doubtful aspects and called upon to provide further specifics, *e.g.*, the name and credentials of his informant. Such an officer is unlikely to exaggerate or misrepresent the evidence upon which he relies. Not only are the deterrents great, but the incentives are small. The search has not yet become a point of honor to be defended; the "hunch," not yet confirmed by events, has not acquired the appearance of inevitability which retrospection may later give it; and the unknown tipster, his information still unverified, will not command that degree of credence which might tempt an officer to overstate his reliability.

The possibility concededly remains that a search warrant may be procured, and a fruitful search conducted, on the basis of assertions which could be proved false if disclosure were ordered. In terms of this case, it is conceivable that the alleged conversation between Agent Moore and the confidential informant never actually took place, or that the informant had not in fact furnished reliable information to the F.B.I. in the past.[10] We believe, however, that the danger that a responsible executive officer, under the penalties of perjury and disciplinary action, would thus intentionally misinform the magistrate is

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[10] Cf., as to the latter aspect, *United States* v. *Pearce*, 275 F. 2d 318 (C.A. 7). In citing this case, we do not wish to be understood as indicating agreement with the court's assessment of the veracity of the pertinent representation made in the affidavit there involved.

not great enough to justify a blanket exception to the privilege. It is a risk which can safely be taken by a society whose protection owes much to the ability of law-enforcement officers to guarantee the anonymity of their sources.

C. In this case, petitioner made no showing which would cast doubt upon the representations

1. In the present case, petitioner made no showing which would justify a failure to give effect to the privilege. The critical representation in the affidavit—the one which undoubtedly constituted both the necessary and sufficient condition for the issuance of the warrant—was that a previously reliable informant advised the affiant that he had seen 75 to 80 unlabeled fur garments in the Rugendorfs' basement and gave a description of them which corresponded almost precisely with the official description of the furs stolen in Mountain Brook, Alabama, the previous month. Petitioner offered no proof, and indeed made no allegation, which cast the slightest doubt upon the accuracy of the affiant's representation or, for that matter, the truth of the informant's story. If anything, the theory of the defense lends credence to both, for the theory has it that the furs must have been placed in the basement several weeks prior to the search (during the Rugendorfs' vacation) by Leo Rugendorf, a known "fence," who possessed a key to the house. What is more, the affidavit shows on its face that it was not merely the work of an agent with a hunch, but was truly based upon an eyewitness report. For while anyone privy to the F.B.I. files,

perhaps, could have copied the official description of the garments stolen in Alabama, only someone who actually saw the furs in the Rugendorf home would have known (i) that they were to be found in the basement, and (ii) that the labels had been removed. Both of these additional details proved to be accurate (R. 70). Admittedly, the success or failure of a search is immaterial to the question whether "probable cause" existed; a search is not made lawful by virtue of what it turns up. *United States* v. *Di Re*, 332 U.S. 581, 595; *Byars* v. *United States*, 273 U.S. 28, 29. But there is no reason why the condition and characteristics of the items uncovered in a search may not be used to confirm, as they do here, the authenticity of a purported eyewitness description made *prior* to the event.

Petitioner makes much of the fact that the information referred to in the affidavit was later shown to be inaccurate in two particulars. The erroneous statements were (1) that petitioner and his brother Leo were in the meat business together, and (2) that Rugendorf Brothers Meat Market was managed by petitioner (*supra*, pp. 13, 14–15). These inaccuracies, we submit, in no way impugn the integrity or truthfulness of the affidavit. In the first place, neither of the items was presented as a statement of fact within Agent Moore's (the affiant's) own knowledge. Both were communicated to him by Agent McCormick, who (in one instance at least) received the information from another informant. Agent Moore did not, and obviously could not, vouch for the accuracy of his briefing, but merely for the fact that the briefing had taken place. And although

representation, had it been false, defense counsel did not seek his testimony.[20]

Second, both items were, at best, of peripheral relevance to the showing of probable cause. If they had any function in the affidavit, it was to establish an association between Leo Rugendorf, the known "receiver," and Samuel Rugendorf, the owner of the house intended to be searched. Such a connection, however, was scarcely necessary, since the two were intimately linked as brothers. And in any case there was no need to show that petitioner was implicated in the theft or receipt of the furs or even that he knew the furs had been deposited in his home. It was not an arrest warrant which was sought, but a search warrant. Having reasonable cause to believe that stolen property was hidden in petitioner's basement, the F.B.I. would have been under a duty to search the premises and recover the property, even had the owner been manifestly innocent of any crime.

Third, there is no reason to believe that either inaccuracy was anything more than on honest, and quite natural, mistake of fact. Testimony at the suppression hearing established that Leo was a salesman for Rugendorf Brothers Meat Market (R. 20–21), and that petitioner, while no longer associated with that enterprise, had at one time been its owner and was still the owner and operator of his own grocery store at another location (R. 19). Indeed, the very name of the meat market at which Leo worked strongly suggested that he was in business

[20] Although McCormick was temporarily hospitalized and unavailable as a witness (*supra*, p. 17), petitioner could have requested a continuance in order to take his deposition. No

with his brother. In these circumstances, and in light of the trivial and superfluous character of the items in question, it seems inconceivable that the facts were deliberately misrepresented to, much less by, the affiant.

The language of the affidavit is ambiguous as to whether the information that petitioner managed Rugendorf Brothers Meat Market originated with Agent McCormick (who communicated it to the affiant, Agent Moore) or with McCormick's informant, Officer Kelleher of the Chicago police. It states that (R. 7):

> Special Agent W. J. McCormick of the Federal Bureau of Investigation told this affiant that * * * on approximately March 1, 1962, Chicago Police Officer James Kelleher told McCormick that he saw Frank Schweihs [whom another informant named as the person who committed the fur burglary in Alabama] at Ruggendorf Brothers Meat Market, managed by Samuel Ruggendorf, at 2449 South Wentworth Avenue, Chicago, Illinois; * * *

Testifying at the suppression hearing, Kelleher confirmed that he told McCormick about having seen Frank Schweihs at the Rugendorf Brothers Meat Market, but he denied telling McCormick that the Market was managed by petitioner (R. 17). Evidently, therefore, the source of the statement was McCormick. Defense counsel might easily have cleared up the issue by requesting leave to take McCormick's deposition[20a] and by asking McCormick

[20a] See fn. 20, *supra*, p. 47.

whether he in fact told the affiant that the Rugendorf Meat Market was managed by petitioner and, if so, where he obtained that misinformation. Counsel did not avail himself of this opportunity, apparently believing that the matter was not of sufficient moment. Without clarification by McCormick, Kelleher's testimony has little significance.

For these reasons, the district court was entirely justified in minimizing the importance of the two inaccuracies (R. 25).[21] And, in the absence of any reasonable basis for doubting the good faith and veracity of the affidavit, the court properly rejected the demand that the government surrender the names of its confidential informants and denied the motion to suppress.

2. We have shown that the trial court was correct in refusing to compel the identification of the informant who saw the furs in petitioner's basement. By the same token the court properly sustained govern-

[21] As noted, *supra*, p. 18, the district court, in overruling the motion, said, "Even if part of the affidavit should be false, the main part of it, the material part, is true, because they actually found the garments there" (R. 25). While its choice of language was unfortunate, the court, we suggest, did not mean to imply that it believed the affidavit to be untrue, even in part. Considering the relative unimportance of the items of information in the affidavit which were shown to have been erroneous and the improbability (for the reasons we have suggested) that the inaccuracies were the product of intentional misrepresentation by anybody, we believe it likely that the court used the word "false" in the sense of "incorrect." In any event, even if the court meant "deliberately false," it is clear that the court was simply making an assumption *arguendo*.

ment objections to questions which, if answered, might have had that same consequence. The queries put to Agent Moore as to where his conversation with the informant took place, and the exact day on which the latter saw the furs (*supra,* p. 18), were clearly of that character. If, for example, the conversation was held at the informant's residence, place of business, or accustomed haunt, an answer describing the place would indirectly have revealed his identity. Similarly, if the informant was one of a number of prospective buyers of the stolen furs permitted to view them during the week in which the informant allegedly saw them, specification of the exact day of the viewing might have exposed him. As we have seen (*supra,* p. 18, fn. 8), government counsel objected to both questions on the ground that answers might jeopardize the informant's life. And the court, apparently recognizing the dangerous potentialities of the questions, properly excused the witness from answering.

Indeed—still assuming the government's right to protect the identity of the informant—it is difficult to see what legitimate purpose petitioner could have for demanding the collateral information. The most obvious utility of that information was to furnish clues to the identity of the informant—plainly an impermissible object. Petitioner suggests that the question as to the place of the informant's conversation with the agent may have relevance for another purpose—namely, that "if the conversation took place in the defendant's basement, or in the immediate

vicinity of the defendant's home, a strong basis would be generated for the belief that the prosecution evidence was the product of an unlawful search" (Br. 28). The short answer is that, if petitioner wished to explore that remote possibility, he could easily have done so by means of direct questions addressed to that very point and calling, initially at least, for "yes" or "no" answers which would not have threatened to expose who the informant was. The only other conceivable purpose of the question was to test Agent Moore's memory and impeach his credibility. But, as we have indicated, the interest of the public in protecting the government's channels of information overrides the interest of the petitioner in conducting a general fishing expedition.

The same considerations apply to the question as to the date on which the informant viewed the furs in the Rugendorfs' home. Petitioner suggests no way in which that information might have assisted him in attacking the representations contained in the affidavit. On the contrary, the stated purpose of the question was to enable petitioner "to attempt to show that he was not present when the informant saw the furs" (Br. 30), not that the viewing did not occur. And while petitioner suggests the possibility that the informant may have gained access to the house with the connivance of the police and "without the permission or the knowledge of the guilty parties *or* the petitioner" (Br. 30), that fact could not have been established by learning the informant's time of entry, since petitioner could not have known whether

the informant had been let in by the police or by the "guilty parties." In any case, as we have noted, the question whether the police were guilty of trespassing, or encouraging the informant to trespass, was one which could safely have been explored by direct questioning of the officers involved.

III

PETITIONER WAS NOT ENTITLED TO THE NAMES OF THE INFORMANTS FOR PURPOSES OF DEFENDING HIMSELF ON THE MERITS, SINCE HE DID NOT ADEQUATELY RAISE THAT ISSUE IN THE TRIAL COURT

1. Petitioner further urges that, wholly apart from the question of the validity of the warrant—the subject at issue in the suppression proceedings—he was entitled to the name of the informant who saw the furs in order properly to defend himself on the merits at the trial proper (Br. 18–27). In the petition for certiorari this claim was placed on the ground that the informant was in a position to know who stole the furs and who put them in petitioner's basement, and therefore could establish petitioner's guilt or innocence. As we pointed out in our brief in opposition, however, the basic issue at trial was whether petitioner *knew* that stolen furs were concealed in his basement. Even if the confidential informant might have been able to testify as to who stole the furs or how they came to rest in petitioner's basement closet, this would not necessarily have cast light upon the issue of petitioner's knowledge. In other words, this is not a case like *Roviaro, supra,* in which the informant had contrived and played a direct and prominent part

in the very offense for which the accused was convicted. See, to similar effect, *Gilmore* v. *United States*, 256 F. 2d 565, 566–567 (C.A. 5).

In his brief on the merits, petitioner advances a somewhat different argument. He contends that the informant, assuming that he was not a trespasser, could have obtained his information only with the acquiescence of the guilty parties. If it was petitioner who admitted him to the house and showed him the furs, then petitioner is "almost certainly guilty." On the other hand, the argument runs, if the informant was admitted by an unauthorized person during petitioner's temporary absence, then by identifying that person and describing the circumstances of the entry, the informer might establish petitioner's innocence or at least provide a lead to other evidence useful to the defense (Br. 20–21). But even on this latter theory, it remains a matter of conjecture whether the informant could materially illuminate the question of petitioner's knowledge. We have strong doubt, therefore, whether petitioners showing would have met the test of *Roviaro* even had the claim been adequately asserted in the district court.

It is unnecessary, however, to decide that question, for in any event petitioner did not properly raise in the trial court the issue whether he was entitled to disclosure for purposes of his defense on the merits. Still less did he articulate the supporting theory on which he now rests that claim. Petitioner's demands for identification of the confidential informants referred to in the affidavit for the search warrant were not made in the course of the trial on the

merits. Without exception, they were made in connection with the proceedings on the motion to suppress, at a time when the principal focus of inquiry was whether disclosure should be ordered for purposes of determining the validity of the search. In this context, such allusions as there were to the possible utility of the information in connection with defense on the merits were too oblique and indefinite to apprise the court of the nature of petitioner's claim.

The first reference to the matter was the statement of defense counsel, in the pre-trial suppression proceeding, that—

> Roviera [*sic*] *v.* U. S., which is cited by our Seventh Circuit as authority for this proposition, states that if the informants, if the names of the informants are necessary to a proper defense or a proper presentation of the defendant's case in attacking the search warrant, then in the interest of justice it must be given to the defendant. * * * [R. 13, 75; *supra*, p. 14]

In context, that citation of authority appeared, and undoubtedly was intended, to be offered in support of disclosure for purposes of "a proper presentation of the defendant's case in attacking the search warrant," not for purposes of "a proper defense." The only other pertinent comment during the pre-trial hearing was the suggestion of defense counsel (R. 14; *supra*, pp. 15–16) "that not only is this information necessary to the defendant because if he takes the stand it will demonstrate that Sam Rugendorf had nothing to do with it, or possibly his falsity, but I would sug-

gest that perhaps he would be a pretty good witness for the Government, that they ought not to want to hide the witness, that he would pretty much make out a case for the Government." Finally, in the further hearing on the motion to suppress, conducted immediately after the government's case-in-chief, but before the presentation of the defense, counsel declared (R. 24; *supra*, p. 19) that "*United States* v. *Roviera* [*sic*] suggests to the Court that we are entitled to some information about this so-called confidential informant, and even if the Court denies my motion that we be given his name, denies the motion about where the conversation took place, can we at least not have the date on when it took place [*sic* [22]] so Sam Rugendorf can defend himself?"

These intimations were as close as petitioner came to placing his demand for disclosure of the informants on grounds related to the defense on the merits. Never did counsel attempt to spell out in what way the testimony of the informants would be useful in establishing petitioner's innocence. Still less did he articulate the specific theory of relevance now urged in his brief. And at no point in the trial of the *merits* did counsel renew the request for disclosure even in its generalized form.

Indeed, there is reason to believe that the theory now advanced did not even occur to defense counsel until long after the trial was over. Petitioner's opening brief in the court of appeals was silent on the

[22] Counsel meant the date on which the informant saw the furs. The date of the agent's conversation with the informant (March 16, 1962) was stated in the affidavit.

need for disclosure for purposes of defense on the merits. The matter of disclosure was discussed solely in terms of the Fourth Amendment issue raised by the motion to suppress. The first hint that the testimony of the informant may also have been relevant to the merits was a suggestion, appearing at the end of petitioner's *reply brief*, that only the informant could testify as to whether he had "participated with persons other than the defendant in placing the furs in defendant's basement," and that it was thus "vital to the defendant to obtain the name of the informant both for use in the hearing on the petition to suppress the evidence and for use in his defense in the trial" (p. 8).[22]

In sum, the issue now raised—whether exposure of the informants was required in order to assist petitioner in the preparation of his defense—was not presented with adequate clarity and specificity at the trial stage. Accordingly, it is not properly before this Court.

2. Petitioner also argues that he needed to know the exact date on which the informant saw the furs

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[22] This argument was subsequently elaborated in the *petition for rehearing* in the court of appeals, where petitioner said: "Certainly, it was material to the theory of the defense to have the jury learn how, with whom, and by what means the so-called informant came to be in the basement of the defendant" (p. 8). (There are indications in the petition for rehearing that the question of how adequately if at all the contention that disclosure was necessary to the defense on the merits was raised at the trial stage was discussed at the oral argument in the court of appeals (pp. 6, 9). The court's conclusion in this regard is perhaps indicated by the fact that its opinion is wholly silent on the present issue.)

in his basement (the affidavit merely disclosed that the event occurred sometime during the week preceding March 16, 1962) in order to prepare his defense, and that the trial court erred in not requiring the government to provide that information (Br. 29–30).[24] In support of that demand, it is urged that if the informant saw the furs at a time when petitioner and his wife were elsewhere, a clear inference would arise that "an unauthorized copy of the petitioner's house key was in the hands of the guilty parties," and that "the thieves were interested in keeping petitioner from learning of the presence of the furs" (Br. 29).

This information, too, was requested by defense counsel solely in connection with the suppression proceedings. On the other hand, the request for the date on which the informant saw the furs was explicitly based upon the importance of the information to the defense on the merits, and, unlike the demand for the *identity* of the informant, was accompanied by an explanation, albeit somewhat generalized, as to the

[24] Petitioner also argues that it was error for the court not to require the government to disclose the place at which the informant's conversation with the agent took place (Br. 28–29). We do not understand him to argue, however, that this information was needed by him in connection with the merits of the defense—as distinguished from its claimed relevance to the suppression issues. No such argument was, in any case, made in the district court, and we do not, even now, see on what theory this information might have been helpful to the defense. See *supra*, pp. 49–51, for our argument as to why, on the suppression issues, this information was rightly withheld if it was proper to withhold the basic information of the informant's identity.

manner in which it would be relevant to the defense (R. 23; *supra*, p. 19). But even if it be conceded that the issue as to the disclosure of this collateral information was properly presented at the trial, the request, nonetheless, was correctly denied. For, as to *this* information, the petitioner cannot meet the test of *Roviaro;* he cannot show that knowledge of the exact date on which the informant gained access to his house would be materially helpful to his defense.

Petitioner testified at the trial that, with the exception of Sundays (when he came home at about 3:00 p.m.), he was away from the house all day every day between March 4 and March 22 (which included the one-week period during which the informant saw the furs), and at home only at night (R. 40). Mrs. Rugendorf testified that, except for Sundays (when she was home all day), she was away from the house three or four hours nearly every day between March 4 and March 18 (which similarly included the relevant one-week period) (R. 32). It is difficult to see, therefore, how disclosure of the precise day on which the informant claimed to have seen the furs could significantly have assisted the defense—even on the theory now advanced in this Court.

IV

THE EVIDENCE IS SUFFICIENT TO SUPPORT THE CONVICTION

As to petitioner's final contention (Br. 40–44)—that the evidence is insufficient to support the conviction—little need be said. The undisputed evidence showed that 81 fur garments, all admittedly stolen, were found in a basement closet of the single-family dwelling in which petitioner and his wife resided. The closet was

one of several that opened off a neatly furnished recreation room showing every evidence of regular use by the occupants. In the same closet with the stolen garments was a fur piece which Mrs. Rugendorf acknowledged to the agents was her own property (*supra*, pp. 3–4). The defense at trial was that these furs were placed in the closet unbeknownst to petitioner while he and his wife were on vacation (from February 17 to March 4); that they had no occasion to look into the closet during the two and one-half weeks which intervened between their return home and the F.B.I.'s discovery of the furs; and that the guilty party must almost certainly have been petitioner's brother, Leo, a known receiver of stolen goods who had borrowed the key to the house just prior to petitioner's vacation and never returned it (*supra*, pp. 5–7).

Where a defendant is found in possession of stolen property a short time after the theft, and comes forward with no satisfactory explanation, it is well settled that the jury may infer the element of guilty knowledge. *Wilson* v. *United States*, 162 U.S. 613, 619. Here the jury was plainly entitled to reject the proffered explanation—an explanation which required it to believe that a thief or receiver would deposit a large number of "hot" furs in the closet of a regularly used basement recreation room in the home of a completely innocent and unknowing third person, *i.e.*, a person who could be expected to call the police the moment he chanced upon the loot.

Moreover, wholly apart from the inherent implausibility of this account, the jury had ample grounds for

disbelieving the testimony of petitioner and his wife. For one thing, whereas petitioner testified that Leo had never returned the house key which petitioner entrusted to him immediately prior to his vacation, Agent Lee, one of the arresting officers, testified that petitioner told him that Leo *had* returned the key—two and one-half weeks previously, shortly after petitioner's return (*supra*, pp. 6, 7). If Lee's testimony was credited, petitioner plainly stood impeached on a key point in his story. In addition, both petitioner and Mrs. Rugendorf gave testimony on various aspects of the related events which sharply conflicted with the rebuttal testimony of the government officer-witnesses (*supra*, pp. 7–11). If, as the verdict indicates, the jury believed the prosecution witnesses, they must have concluded that the defense witnesses were lying about numerous aspects of the events in question. And, if satisfied that they were fabricating as to details, the jury could rationally conclude that the central point of their stories—that they were unaware of the presence of the furs in their home—was likewise false.

In *Dyer* v. *MacDougall*, 201 F. 2d 265, 269 (C.A. 2), quoted with approval in *National Labor Relations Board* v. *Walton Mfg. Co.*, 369 U.S. 404, 408, the court of appeals declared that—

> [S]uch evidence [a witness's demeanor] may satisfy the tribunal, not only that the witness' testimony is not true, but that the truth is the opposite of his story; for the denial of one, who has a motive to deny, may be uttered with such

hesitation, discomfort, arrogance or defiance, as to give assurance that he is fabricating, and that, if he is, there is no alternative but to assume the truth of what he denies.

Here the jury had much more than the defense witnesses' demeanor to go by; they had evidence of repeated and deliberate misrepresentations.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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JANUARY 1964.

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APPENDIX

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Section 2315 of Title 18 of the United States Code provides in pertinent part:

> Whoever receives, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise, securities, or money of the value of $5,000 or more, or pledges or accepts as security for a loan any goods, wares, or merchandise, or securities, of the value of $500 or more, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted, or taken; * * *
>
> * * * * * *
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.
>
> * * * * * *

Rule 41 of the Federal Rules of Criminal Procedure provides in pertinent part:

> RULE 41. SEARCH AND SEIZURE
>
> (a) *Authority to Issue Warrant.* A search warrant authorized by this rule may be issued by a judge of the United States or of a state, commonwealth or territorial court of record or by a United States commissioner within the district wherein the property sought is located.

(b) *Grounds for Issuance.* A warrant may be issued under this rule to search for and seize any property.

(1) Stolen or embezzled in violation of the laws of the United States; or

* * * * *

(c) *Issuance and Contents.* A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. * * *

* * * * *

(e) *Motion for Return of Property and to Suppress Evidence.* A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the ground that * * * (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued * * * * * *

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